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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-127

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION ET AL., *Petitioners,*

v.

GEORGE P. SCHULTZ, Secretary of the Treasury, ET AL, *Respondents.*

PETITION FOR THE ISSUE OF A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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The undersigned attorneys, on behalf of the Maryland-National Capital Park and Planning Commission, the District Council for Prince George's County, and the Calverton Citizens Association, Plaintiffs in Case No. CA 255-72 in the U. S. District Court for the District of Columbia and Appellants in Appeal No. 73-1711 in the U. S. Court of Appeals for the District of Columbia, petition for a Writ of Certiorari to review the final judgment and decision of the U. S. Court of Appeals for the D. C. Circuit.

OPINIONS BELOW

The Opinion of the District Court was filed on May 11, 1973. The Court of Appeals issued a Show Cause Order for summary reversal on July 23, 1973. This

Order was rescinded on August 22, 1973. The Court of Appeals affirmed the judgment of the Court below, without filing an Opinion on May 8, 1974. Petition for rehearing was denied on July 5, 1974. The Opinions of the Courts below are reproduced in the Appendix hereto.

JURISDICTION

The denial of the Motion for Rehearing rendered the Decision of the Appellate Court final and the jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court initially erred in disposing of this cause of action by Summary Judgment in violation of Rule 56 of the Federal Rules of Civil Procedure when the pleadings and affidavits in the record reveals there are material issues of fact in dispute?

2. Whether in a case presenting conflict between Federal Land Use Decisions and locally established land use policies and adopted master plans, the Courts below erred in limiting scrutiny and review to whether the procedural requirements of Sec. 102 NEPA were mechanically complied with and in ignoring specific allegations of violations of substantive requirements of National Environmental Policy Act, 1969, and dispensing with a trial on merits?

3. Whether the U. S. Court of Appeals for the D. C. Circuit erred in determining, pursuant to Local Rule 13(c) that the issues presented by this case "occasion no need for an opinion" in the light of the

record disclosing, a) that a panel of the same Court, earlier on its own motion, issued a Show Cause Order for summary reversal, b) that another panel disagreed with the original panel and rescinded the Show Cause Order and directed the parties to brief the Court in detail and the case was argued at length; further erred in not complying with its own Local Rule 13(c) in failing to make a notation of precedents or at least to file a brief memorandum?

FEDERAL STATUTORY PROVISIONS INVOLVED

The relevant Federal Statutory Provisions involved are: National Environmental Policy Act, 1969 (PL-91-190, 83 Stat. 853), Section 101, Section 102 42 U.S.C. 4331-4332

Administrative Procedure Act, 5 U.S.C. 701, Section 706

Rule 13(c) of the Local Rules of the D. C. Circuit

42 U.S.C. § 4331

SUBCHAPTER I.—POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is

the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

42 U.S.C. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsibile official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and pre-

venting a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

5 U.S.C. § 706 Judicial Review

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

RULE 13

U. S. APPEALS D. C. RULES

RULE 13 (Added July 1, 1968)

OPINIONS OF THE COURT

(Added July 1, 1968)

(a) PRINTED; RENDERED BY FILING WITH CLERK. All opinions of the court shall be printed, unless otherwise ordered, under the supervision of the judge writing the opinion, and shall be rendered by being filed with the clerk. The clerk shall preserve the original opinions. (Added July 1, 1968)

(b) RECORDED WHEN BOUND. Opinions need not be recorded by the clerk into the minute book of the court but he shall from time to time cause copies of the opinions to be bound in a substantial manner into volumes and when so bound they shall be deemed to have been recorded. (Added July 1, 1968)

(c) ORDER FORM OF DECISION. In accordance with recommendations for improvement of judicial

administration,[1] this court may, while according full consideration of the issues, dispense with opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate, e.g., affirmance by order of a decision or judgment of a court or administrative agency; a judgment, or affirmance or reversal, containing a notation of precedents, or accompanied by a brief memorandum. (Added July 1, 1968)

(d) REMAND. If the RECORD in any case is remanded to a court or agency, this court retains jurisdiction over the case.

If the CASE, is remanded, this court does not retain jurisdiction, and a new Notice of Appeal or Petition for Review will be necessary if a party seeks review of the remand proceedings.

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[1] Report of the President's Commission on Crime in the District of Columbia (1966) p. 308; and see Canon 19—American Bar Association Canons of Judicial Ethics; Position adopted by the Judicial Conference of the United States —March 16, 1964. (Added July 1, 1968)

STATEMENT OF THE CASE

The Petitioners submit that the decisions of the Courts below are palpably erroneous arising from a misreading of the pleadings and a grave injustice was perpetrated by them as the following narrative would establish.

Parties

The Appellants. The Maryland-National Capital Park and Planning Commission is a corporate body politic created by Chapter 780, Laws of Maryland

1959, as amended, being also codified as Chapter 85 of the Montgomery County Code (1972) and Chapter 59 of the Code of Public Local Laws of Prince George's County (1963). The Commission is charged by law with certain powers and authority relating to planning, zoning, administration of subdivision regulations, building permits, and other related matters for the Maryland-Washington Regional District, and for the acquisition, development, and maintenance of public parkland within the Maryland-Washington Metropolitan District, which include generally, all of Montgomery and Prince George's Counties, Maryland, and includes the area of the subject site in question. The Prince George's County District Council is a public body created by Chapter 780, Section 75, Laws of Maryland, 1959, as amended, and is charged by law with legislative power and authority for planning and zoning and related activities within Prince George's County within the Maryland-Washington Regional District; the Calverton Citizens Association is a nonprofit corporation organized and existing under the Laws of the State of Maryland for the purpose of furthering and protecting the interests of its members who live in close proximity to the proposed site in question and will be directly affected by the subject project.

The Appellees. The Department of the Treasury is an executive department of the United States, 1 Stat. 65; the General Services Administration is an executive agency of the United States, 63 Stat. 379; the Department of Justice is an executive department of the United States, 16 Stat. 162.

THE GRAVAMEN OF THE CONTROVERSY

A 1967 study of the U. S. Bureau of the Budget proposed that a Consolidated Federal Law Enforcement Training Center (CFLETC) be constructed to meet the training needs of Federal Law Enforcement Agencies and an inter-agency agreement was entered into between approximately 20 Federal agencies to establish the Training Center at Beltsville, Prince George's County, Maryland, on approximately 490 acres. This agreement resulted in a prospectus submitted to Congress in 1969. The cost of the facility was estimated at $52 million and entails extensive construction of buildings by clearing approximately 120 acres of wooded area.

In 1961 the National Capital Planning Commission (NCPC) adopted and published "A Plan for the Year 2000." This plan provided for "corridors" of development extending and radiating from the District of Columbia into the surrounding environs in Maryland and Virginia separated by "wedges" of open space. In the year 1964, the Petitioner Maryland-National Capital Park and Planning Commission adopted "On Wedges and Corridors", a plan for the physical development of the Maryland-Washington Regional District to implement the development concept contained in the plans and recommended by the NCPC. The site on which CFLETC is sought to be located is an open space "wedge" area separating "corridors" of development within Prince George's County. As there would be irreparable environmental damage resulting from the proposed CFLETC, the Petitioners opposed the establishment of the project and rested their objections on violation, by the Defendants, of the substantive and procedural mandates of NEPA,

in their case before the Courts below. The District Court because of an erroneous construction of the pleadings and affidavits held that only procedural violations of NEPA were alleged and ignored the allegations of substantive violations; the Court further compounded the error by declaring there were no disputed questions of fact in issue and deprived the Petitioners of a fullfledged trial by granting the Defendants' Motion for Summary Judgment in their favor under Rule 56(b) of the Federal Rules of Civil Procedure. The Petitioners filed an appeal to the U. S. Court of Appeals for the District of Columbia Circuit. On July 23, 1973, after examining the record and the submissions of each party, a panel of that Court, on its own motion, issued an Order to Show Cause as to why the decision of the District Court should not be summarily reversed. On August 22, 1973, another panel of the Appellate Court rescinded the Show Cause Order and directed the parties to fully brief the Court and argue the case. On May 8, 1974, the Decision of the Court below was affirmed, without filing an Opinion, citing Local Rule 13(c). The Petitioners are urging their case before this Court of Last Resort, suffering from the failure of the Circuit Court of Appeals to file an Opinion, for they are unable to perceive the true reasons for the Court of Appeals' Decision. The case involves disputed questions of fact, which are set out in the pleadings and affidavits, and a trial on merits is warranted in the interests of resolving the conflict in the land use decisions. This is all that Petitioners seek.

MATERIAL FACTS IN DISPUTE

The initial error committed by the District Court, which pervades its own Decision and the Appellate review is that the District Court erroneously held that there are no material facts in dispute and only questions of law are to be decided. Paragraph 16 of the Second Amended Bill of Complaint addresses itself to violations of the substantive provisions of NEPA and alleges that the Environmental Impact Statement of November 24, 1972 is an inadequate assessment of the impact of the project and articulates that allegation by stating the following:

Bill of Complaint	Answer
Allegation	*Denial/Admission*
16. That the Environmental Impact Statement of November 24, 1972 is not a full and adequate assessment of the environmental impact of the proposed Project for the following reasons:	
(a) The Defendants GSA and Department of the Treasury have failed to provide a master plan for the 11,000 acre tract owned by the Federal Government to show the future planned use and development of the entire tract. The area which includes the 11,000 acre tract has been designated as a "wedge" of open space between two "corridors" of development by the General Plan for the physical development of the Maryland-Washington Regional District, known as	(13) Defendants deny the allegations contained in paragraph (16)(a) except that defendants admit that neither the Treasury nor G.S.A. has prepared a master plan for the Agriculture Research Center which remains under the jurisdiction of the Department of Agriculture;

"On Wedges and Corridors", adopted by the Park and Planning Commission in January of 1964 and also by the General Plan for the Metropolitan Washington Region adopted by the National Capital Planning Commission, known as "A Plan for the Year 2000-The Nation's Capitol". That without the preparation of a master plan for the entire 11,000 acre tract a project-by-project conversion of this wedge area from open space use to intensive use would be possible with resultant adverse environmental consequences for the entire metropolitan area and, in particular, for the Maryland - Washington Regional District within Prince George's County.

(b) That the President's Property Review Board is presently considering a proposal to use the undeveloped portion of the 11,000 acre tract for park and recreation purposes together with surrounding Federal properties; that the Environmental Impact Statement did not consider this proposed park and recreation use and that a project-by-project development of this area would negate the plans for the ultimate and complete use of this entire 11,000 acre tract as proposed by the said President's Property Review Board.

(14) Defendants deny the allegations contained in paragraph (16)(b) except that defendants admit undeveloped portions of the Agriculture Research Center and portions of Fort Meade are presently under review by the Property Review Board for possible park use;

(c) That the Environmental Impact Statement projects the proposed development and occupancy by both residents and employees on an area of 5,000 acres instead of the 490 acres which have been transferred to GSA and Department of the Treasury for this Project. This is an arbitrary and unrealistic statement in that there is no master plan for the 5,000 acres considered by the Environmental Impact Statement, or for the entire 11,000 acre tract, to indicate or project possible development by other Federal agencies so as to be properly evaluated, nor is the Environmental Impact Statement premised on any inquiries or response as to future plans for development of the surrounding land by the Federal agencies which presently hold title thereto.

(2) Defendants deny the allegations, contained in paragraph 12, 13, 15(b), 16(c), 16(e), 16(g), 16(i), 16(k), 16(l), 16(m), 16(n) and 16(o);

(d) That there is not a full and complete disclosure of all facts on the projected occupancy of the Project in that the Environmental Impact Statement is predicated on a daily population of 1,300 occupants; the Defendants applied for and received approval by the National Capital Planning Commission for a daily occupancy of 2,700 occupants; the underground installation for water,

(15) Defendants admit the allegations contained in paragraph (16)(d) except that defendants deny the figures set forth therein are not fully set forth and discussed in the environmental impact statement;

sewer and other utilities is planned to accommodate a daily population of 3,500 occupants.

(e) The Environmental Impact Statement arbitrarily defines open space as including "institutional use" provided that no more than 10% of the land allocated for said institutional use is developed. The subject Project, upon completion, would develop 25-30% of the 490 acre parcel it is to occupy and, therefore, said Project violates the arbitrary standards assumed and used by the Environmental Impact Statement.

(2) Defendants deny the allegations, contained in paragraphs 12, 13, 15(b), 16(c), 16(e), 16(g), 16(i), 16(k), 16(l), 16(m), 16(n) and 16 (o);

(f) The Environmental Impact Statement considers and uses the standards for open space wedge areas as established by the Maryland-National Capital Park and Planning Commission (.5 residents and 1.5 employees per acre) and admitted the Project would eventually involve 4.6 residents and 2.5 employees per acre and, therefore, would substantially exceed the standards established by the Park and Planning Commission; however, the Environmental Impact Statement did not consider the adverse environmental impact generated

(16) Defendants deny the allegations contained in paragraph (16)(f) except that defendants admit that the relationship of the use of the proposed site to population densities proposed for wedges by MNCPPC was fully considered in the environmental impact statement;

by the departure and use in excess of the standards established by the Park and Planning Commission.

(g) That Executive Order 11512 requires that proposed Federal projects shall, to the greatest extent possible, be consistent with state, regional, and local plans and programs. That the preservation of the 11,000 acre tract at Beltsville, Maryland, as an open space wedge area, is a Federal and regional goal as set forth in the adopted general plans "on wedges and corridors" and "The Year 2000 Plan"; that the construction of the proposed Project is inconsistent with said Federal and regional plans, programs and policies.

(2) Defendants deny the allegations, contained in paragraph 12, 13, 15(b), 16(c), 16(e), 16(g), 16(i), 16(k), 16(l), 16(m), 16(n) and 16 (o);

(h) The Environmental Impact Statement is premised on the supposition that the planned expanded and upgraded sewage facilities of the Department of Agriculture will be utilized by the proposed Project for its sewage disposal. The Department of Agriculture has not filed an Environmental Impact Statement on its planned expanded sewerage facilities; that the present Environmental Impact Statement of November 1972 filed by the Defendants omits a major component of

(17) Defendants deny the allegations contained in paragraph (16)(h) except that defendants admit an environmental statement covering the expansion of the Department of Agriculture sewage facility has not yet been filed;

the environmental impact of the Project unless it considers the environmental impact of the expansion of facilities on which it relies for services and whether the expanded facilities are feasible.

(i) The Environmental Impact Statement does not consider or evaluate the problem of siltation and erosion control for the Project, both during construction and after the Project is completed.

(2) Defendants deny the allegations, contained in paragraphs 12, 13, 15(b), 16(c), 16(e), 16(g), 16(i), 16(k), 16(l), 16(m), 16(n) and 16(o);

(j) The Project provides for approximately 35 acres to be used as an automobile driving range; that within the 490 acre parcel is situated the Beltsville Airport with extensive paved runways which could be used as part of the new automobile driving range; that the Environmental Impact Statement does not consider the possibility of locating the automobile driving range at the Beltsville Airport site in order to save the destruction of natural foliage and vegetation, and to reduce the impervious area created by the new automobile driving range.

(18) Defendants deny the allegations contained in paragraph (16)(j) except that defendants admit approximately 35 acres are planned to be used for a driving range;

(k) That the Environmental Impact Statement does not adequately consider the possibility of the proposed Project becoming a key to the opening

(2) Defendants deny the allegations, contained in paragraphs 12, 13, 15(b), 16(c), 16(e), 16(g),

up of more intensive development of the open space wedge area by encouraging the location of similar Federal projects and thereby constituting an adverse environmental hazard.

(l) The Environmental Impact Statement declares that it would be necessary and desirable to enlarge the size and capacity of Powder Mill Road because of the said Project, but does not discuss the nature of improvements to be made to Powder Mill Road or the adverse environmental impact of such improvements.

(m) The Environmental Impact Statement did not adequately consider alternative sites for the Project in that:

i The needs of the Project were narrowly defined so as to make it appear that the proposed location was the only suitable site.

ii That there are existing buildings which satisfy the needs of the Project but are not adequately considered because they would require further elaborate negotiations.

iii That the environmental benefits of selecting other ex-

16(i), 16(k), 16(l), 16(m), 16(n), and 16(o);

(2) Defendants deny the allegations, contained in paragraphs 12, 13, 15(b), 16(c), 16(e), 16(g), 16(i), 16(k), 16(l), 16(m), 16(n) and 16(o);

(2) Defendants deny the allegations, contained in paragraphs 12, 13, 15(b), 16(c), 16(e), 16(g), 16(i), 16(k), 16(l), 16(m), 16(n) and 16(o);

isting buildings as opposed to the economic costs of abandoning the present site were not adequately or properly explored.	
(n) The Environmental Impact Statement did not adequately consider the impact of the Project on Prince George's County in that County resources would have to be diverted from the present planning and economic policies of the County to provide services for the residents and employees of the Project.	(2) Defendants deny the allegations, contained in paragraphs 12, 13, 15(b), 16(c), 16(e), 16(g), 16(i), 16(k), 16(l), 16(m), 16(n), and 16(o);
(o) That in making their final decision on January 4, 1973 to proceed with the proposed Project, the minutes of the meeting of the Board of Directors of the Consolidated Federal Law Enforcement Training Center do not show that the Board considered all elements of the Environmental Impact Statement of November 1972, the possible adverse environmental effects and various alternatievs.	(2) Defendants deny the allegations, contained in paragraphs 12, 13, 15(b), 16(c), 16(e), 16(g), 16(i), 16(k), 16(l), 16(m), 16(n) and 16 (o);

LEGAL BASES OF THE PLAINTIFF'S CASE

The Plaintiffs submit that NEPA, 1969, was violated by Defendants in regard to, a) the procedural requirements stated in Sec. 102, b) the substantive requirements set out in Sec. 101. The District Court in its Opinion observed that only procedural issues are raised by the Plaintiffs. This is a palpably erroneous view

of the case which precipitated a grave miscarriage of justice. On a fair reading of the Bill of Complaint, the Answer, the Affidavits of Messrs. Giauque, Valladares and Duru, in support of the Plaintiffs' case, the District Court should have seen that the issues presented are substantive in nature coming within the perview of Sec. 101 and also Sec. 102 of NEPA.

Mr. Giauque in his affidavit in support of the opposition Motion for Summary Judgment stated that he is the Regional Planning Officer employed by Plaintiff Maryland-National Capital Park and Planning Commission and that the Environmental Impact Statement is impossible to evaluate when taken in context with conflicting statements relating to the projected population of the Center. He also stated that the EIS does not adequately consider the impact on the environment caused by the destruction of natural foliage and the construction of a driving range of 35 acres. The creation of impervious surfaces over 30% of the acreage with buildings, parking lots, driving ranges with increased water runoff causing increase in sedimentation in area streams. He stated that the EIS failed to discuss the environmental impact caused by the expansion of Powder Mill Road. He also stated that the project is sought to be located at the head waters of the Anacostia watershed and any moderate modification of the environment at the head waters of a major watershed, such as the Anacostia watershed, will have a compounding effect on property and residences downstream. The placing of this Center at its proposed location could have serious damaging effects upon the orderly development of a large area of the Anacostia Basin.

In the face of the serious concerns expressed in the affidavit, the District Court erred in stating that only questions of procedure in preparing the impact statement are at issue in the case.

The Affidavit of Jorge Valladares in support of the application for Preliminary Injunction which was heard along with the Motion for Summary Judgment, states that he is employed by the Plaintiff Maryland-National Capital Park and Planning Commission as Coordinator of Environmental Engineering and that the sewer treatment problem is not solved by entering into an agreement for sewer treatment with the Department of Agriculture as there is an outstanding question as to whether there is adequate water available to operate the sewer plant of the Department of Agriculture. He pointed out that if employment projections for NASA and the Department of Agriculture were also taken into account, the entire basis for the assumption that the density of people in the area will be within the permissible level would be vitiated. He stated that there is no attempt to ascertain from other government agencies the planned use of the wedge area. The statements as to specific plans for CFLETC area use, area need, and facility layout are not in the EIS and with proper planning it may be possible to plan more realistically than to consume 481 acres of wedge space and expend $52.7 million. These are a few of the averments of environmental damage in his affidavit of over five pages.

Yet the District Court held that there are no material questions of fact in issue and only questions of procedure are at issue.

The Affidavit of Mr. Duru states that he is a Principal Planner and Hydrogolist and that the proposed

project renders a large tract impervious and the planned 16 acre lake will not by itself meet the requirement of runoff control; that if the dam is downstream of the paved area and if the freeboard of normal level exceeds 100,000 cubic feet of water from a two-year frequency storm the release rate should not exceed the runoff rate "prior to the development of the tract."

The Defendants in contrast did not file any affidavits to counter these. The District Court should have seen that the disputed facts are of a material nature and fall within the ambit of the concerns to which NEPA address itself. As such it is respectfully submitted that it is inappropriate to grant a summary judgment, dispensing with a trial on merits.

REASONS URGED FOR THE GRANT OF WRIT

1. Public Interest.

The preservation of the integrity of local and regional plans for land use, while making decisions relative to location of Federal projects and installations is a matter of utmost public importance since those plans are established for the protection of the health, welfare, and safety of the public. Though those plans are not in a technical and legal sense binding upon the Federal Government, it is incumbent upon the Federal Government not to undo those plans. *M-NCPPC v. U. S. Postal Service,* 487 F.2d 1029 (D.C.Ct) 1973. It is submitted that where a question arises as to whether a major Federal project location is in conflict with the regional and local plans, as is the case here, the Congressional declaration of national policy enunciated in NEPA, to recognize the profound influences of population growth, high density urbanization, and the critical importance of restoring and

maintaining environmental quality to the overall welfare and development of man and further declaration of policy of cooperation with the state and local governments, is a clear mandate to the Federal Courts to review the controversy to weed out arbitrary and capricious actions of Executive Agencies, which are in derrogation of this policy. This mandate cannot be discharged by narrowly construing the pleadings and confining judicial scrutiny to whether procedures mandated of NEPA were complied with, ignoring the substantive questions raised. In the instant case, the granting of Summary Judgment without a trial on the merits, would amount to a mere lip service to the mandate.

The National Capital Region is one of the fastest growing in the Nation and it is incumbent on the governments of the region, Federal, State and Local, to preserve green spaces established pursuant to the "Plan For The Year 2000" and the "Wedges And Corridors" Plan. A review and reversal of the decision of the Courts below with a direction to the District Court to try the case on its merits would serve national policy and public interest.

2. Lack of Good Faith Compliance with NEPA.

The initial decision to locate the CFLETC near Beltsville, Maryland, was made in an inter-agency agreement between 20 Federal agencies, entered in 1968. A proposal was submitted to Congress on September 5, 1968, to establish the site of the CFLETC at Beltsville, Maryland. The compendium of guidance documents concerning the CFLETC entitled "Guidance for CFLETC" issued by the Department of the Treasury, March 25, 1971, states that the "most

suitable site in the area is the Department of Agriculture property northeast of the intersection of Washington-Baltimore Parkway and Powder Mill Road near Beltsville." Congressional appropriations were made for the location of the CFLETC at Beltsville, Maryland. There were numerous policy decisions taken by the highest officials of the Treasury Department which were based on a Beltsville location for CFLETC. While matters stood thus, in January 1972, Mr. William B. Butler was appointed as the Director of the CFLECTC. He, as the "responsible official", is said to have prepared the impact statement which purports to consider the environmental impact of the project and possible alternatives for location. This official in his deposition acknowledged that,

(a) Construction work was going on at the project site while he was considering the "alternatives" for location of the project and assessing the environmental impact of the project.

(b) Neither planning nor construction was in any way halted during the preparation of the 1970 EIS, which was later withdrawn as inadequate.

(c) Contracts for the project continued to be awarded.

(d) Money continued to be expended. The 1970 EIS stated that the expenditure was $1,992,000 as of July 1970, and the 1972 EIS stated that the expenditure as of June 1972 was $4,997,000.

(e) Business was going on "as usual" while the Director, in all seriousness, was implementing the mandate of NEPA and making an environmental assessment and considering possible alternative sites and locations.

Such conduct of the Treasury Department officials is not a good-faith compliance with the mandate of NEPA and a more detailed "inquiry" is warranted at the trial of the case.

The impact statement justifies the prior decision to locate at Beltsville, Maryland, rather than assess the environmental impact to arrive at a decision. On a fair reading of the Environmental Impact Statement filed in this case, it is inevitable to conclude that the officials of the Federal government, having decided to locate the project on the site at Beltsville, Maryland, as early as 1968 and having put considerable effort in implementing this decision, and having expended considerable public money, are merely justifying their decision in the guise of making an environmental impact assessment.

The above is an abbreviated statement of the factual case to be developed and presented on the issue of a good faith assessment of the environmental impact of the CFLETC. By the use of Summary Judgment the District Court effectively precluded the Petitioners from having their day in Court. Petitioner is aware that its allegation is one of elementary hornbook error; however, by the erroneous use of Summary Judgment when there are material facts in issue and determining there are only procedural violations alleged, the District Court has set the stage for a complete miscarriage of justice. Petitioners' allegation of error is lost in the consideration of the elements of the District Court's Opinion. Furthermore, without an Opinion by the Circuit Court of Appeals, we have no way of knowing what consideration was given to this basic point by the Appellate Court.

3. The Court of Appeals Sanctioned a Departure From the Accepted and Usual Course of Judicial Proceedings.

The Petitioner submits that this is a case in which the Lower Court, by erroneously construing the pleadings and affidavits, held that there are no material facts in dispute. On a fair construction of the pleadings, affidavits, deposition and arguments, the Court could not have come to that conclusion. In paragraph 1 of the Footnote to the Lower Court's Opinion, the Court observes that "This suit is brought under 42 USC 4332 (Sec. 102 of NEPA) and, accordingly, the Court addresses itself only to the question of whether the Defendants have complied with the procedural requirements of the Act. Substantive questions must be answered with reference to 42 USC 4331 (Sec. 101 of NEPA) not here in issue . . ."

Yet on a fair reading of the Bill of Complaint the District Court should have seen that the citation "4332" is a clerical mistake for "4331" and the true nature of the action is to seek redress for a violation of NEPA, 1969, which should be cited as PL 91-190, 83 Stat. 853, 42 USC 4331. This clerical error was made to prevail over the various allegations in paragraph 16 by resorting to a narrow and pedantic construction of the pleadings, in the manner of a procrustean bed, to defeat the ends of justice.

The condonation of this attitude of the District Court is a manifest error of the Court of Appeals in the disposition of this case and the Petitioners pray that this Court of Last Resort in the interests of substantial justice remand the case to the District Court for a trial on merits.

CONCLUSION

The Petitioners pray that, in the light of these considerations, a Writ of Certiorari may be issued to the U. S. Court of Appeals for the District of Columbia Circuit, and the decision of that Court in this case be reviewed by this Honorable Court.

Respectfully submitted,

ROBERT H. LEVAN
SANFORD E. WOOL
MICHAEL S. YAROSCHUK
Attorneys for Petitioners

Certificate of Service

I HEREBY CERTIFY that on this———day of————, 1974, a copy of the foregoing Petition for the issue of a Writ of Certiorari was mailed by first class mail, postage prepaid, to Wallace H. Johnson, Edmund B. Clark, and Jacques B. Gelin, Attorneys for Appellees, Department of Justice, Washington, D. C. 20530.

I further certify that all parties required to be served have been served.

SANFORD E. WOOL
Attorney for Petitioner